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No. -

# In the Supreme Court of the United States

OCTOBER TERM, 1998

FELIX SANTIAGO,
PETITIONER,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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## QUESTIONS PRESENTED

1. Does the retroactive application of a statute to a criminal case, ordered dismissed by the court prior to enactment of the statute but before actual dismissal, violate the Due Process Clause of the Fourteenth Amendment?

2. Does the retroactive application of a statute to a criminal case, ordered dismissed by the court prior to enactment of the statute but before actual dismissal, violate the ex post facto provision of the constitution?

3. Where both the prosecution and defense relied upon a particular interpretation of the law as it existed at the time the crime was committed, does due process protect the justifiable reliance upon the old interpretation to the extent that an alternative interpretation would not be permitted on retrial?

4. Where both the prosecution and defense relied upon a particular interpretation of the law as it existed at the time the crime was committed, would a new interpretation at a retrial violate the ex post facto clause of the Constitution where the new interpretation deprived petitioner of his defense?

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---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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Felix Santiago respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

## OPINIONS BELOW

The opinion of the Supreme Judicial Court is reported in *Santiago* v. *Commonwealth*, 428 Mass. 39 (1998); 697 N.E.2d 979 (App. A-1). Other opinions in the case are *Santiago* v. *Commonwealth*, 427 Mass. 298 (1998) 693 N.E.2d 127 (App. A-8); and, *Commonwealth* v. *Santiago*, 425 Mass. 491 (1997), 681 N.E.2d 1205. (App. A-14).

## JURISDICTION

The decision below was issued on July 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C.1257(a).

## CONSTITUTION OF THE UNITED STATES

### AMENDMENT XIV.

**§1. Citizenship rights not to be abridged by states**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

### ART 1, §9

**§9 Limitations upon powers of Congress**

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congess prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duly shall be paid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state.

## STATUTES

The following statutes as set out in Appendix D of this Petition: Massachusetts General Laws, c. 211, § 3, c. 119, § 72 as Amended, Chapter 98 of Acts of 1998 and Rule 23 of Massachusetts Rules of Appellate Procedure.

## STATEMENT OF THE CASE

The petitioner, a juvenile, was charged with delinquency by reason of the crime of murder, armed assault with intent to murder, assault by means of a dangerous weapon, unlawful possession of a firearm, and unlawful possession of ammunition. The case arose out of a gunfight between petitioner and Ludwin Midence, an adult, at the Carter Playground on Columbus Avenue in the South End Section of Boston, on June 5, 1994. Killed by a stray bullet was Vilma Flores.

In connection with the death of Vilma Flores, Midence was charged with manslaughter. He was also charged with armed assault with intent to murder, assault by means of a dangerous weapon, unlawful possession of a firearm, and unlawful possession of ammunition. The victim of these charges was the

petitioner. Midence pleaded guilty to all charges and was sentenced. The petitioner was charged with murder in the death of Flores, as well as assault on Midence.

The Commonwealth sought to have the petitioner tried as an adult. After a transfer hearing a judge of the Roxbury District Court declined to transfer the case to the Superior Court. Therefore, the petitioner could not be tried as an adult.

The petitioner was then brought to trial before a judge of the juvenile court, sitting in Roxbury, without a jury. Petitioner was found delinquent by reason of murder in the first degree. He was also found delinquent on the other charges. Thereafter, the petitioner claimed his right to a trial by jury.

The petitioner was brought to trial before a judge and jury on June 3, 1996. The Commonwealth proceeded on the theory that it was the petitioner who fired the bullet which struck and killed Vilma Flores. This theory was the reason the prosecution charged Midence only with manslaughter. At trial, however, the evidence showed that Midence fired the first shot, and the petitioner defended on the ground of self-defense. In this regard, he attempted to introduce evidence that Midence had entered a plea of guilty to the assault charges in which the petitioner was the victim. The evidence was excluded.

On June 7, 1996, the jury returned a verdict of delinquency by reason of murder in the first degree. Thereafter, the mandatory sentence for juveniles convicted of this offense was imposed. The petitioner appealed.

The adjudication of delinquency was reversed by the Supreme Judicial Court. *Commonwealth* v. *Santiago*, 425 Mass. 491 (1997), 681 N.E.2d 1205. The date of the opinion and rescript was July 21, 1997. Pursuant to Rule 23 of the Massachusetts Rules of Appellate Procedure, the rescript was issued to the Boston Juvenile Court twenty-eight days later. At that time the petitioner had turned twenty years old.

The statute in effect on June 5, 1994, the date of the offense, was Massachusetts General Laws Chapter 119, Section 72 as amended by Chapter 398 of the Acts of 1992. Under this

statute the juvenile court lost jurisdiction over a person after their nineteenth birthday.

The petitioner moved to dismiss the case in the juvenile court on the ground, because of his age, that the juvenile court no longer had jurisdiction to try him. The motion was denied. Thereafter, the petitioner filed a petition before the single justice of the Supreme Judicial Court pursuant to Massachusetts General Laws, Chapter 211, Section 3. The single justice reserved and reported the matter to the Full Court. On April 14, 1998, the Supreme Judicial Court ordered that judgment be entered in the county court directing that the indictment be dismissed because the juvenile court no longer had jurisdiction to try the petitioner. *Santiago* v. *Commonwealth*, 427 Mass. 298 (1998), 693 N.E.2d 127.

Following the April 14, 1998 decision, the Commonwealth made application to have the indictment transferred to the Supreme Judicial Court for trial; and, the Legislature, on April 23, 1998, enacted Chapter 98 of the Acts of 1998, An Act Relative To The Prosecution Of Juvenile Offenders. Under this statute, the juvenile court would retain jurisdiction over persons whose delinquency adjudication had been reversed on an appeal and a new trial ordered, regardless of age.

On its own motion, The Supreme Judicial Court ordered rehearing and directed the parties to brief the issue of trial in that court and the application of Chapter 98 of the Acts of 1998 to the status of petitioner.

On July 21, 1998, the Supreme Judicial Court reversed itself on the order of dismissal holding that, since the indictment had not actually been dismissed, the new statute extending jurisdiction was applicable to the petitioner. *Santiago* v. *Commonwealth, II*, 428 Mass. 39 (1998) 697 N.E.2d 979.

In *Commonwealth* v. *Santiago*, 425 Mass. 491 (1997), 681 N.E.2d 1205, the court reversed the delinquency adjudication and ordered a new trial because of prosecutorial misconduct. However, the court also stated that the Commonwealth, on retrial, could change its theory of the prosecution; that it

could proceed on the theory that if two people mutually engaged in a shoot-out and a third person is killed, both could be found guilty of murder. This would completely obliterate petitioner's defense of self-defense.

In *Santiago* v. *Commonwealth, II*, 428 Mass. 39 (1998) 697 N.E.2d 979 petitioner argued that application of this new theory would be ex post facto. He also argued that it would be a violation of due process. The Supreme Judicial Court disagreed and reaffirmed that the Commonwealth could proceed on the new theory.

Thereafter, petitioner sought and obtained from the Supreme Judicial Court a stay of the issuance of the rescript pending application for certiorari in the Supreme Court of the United States.

## REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fourteenth Amendment is perhaps the single most important Constitutional Provision concerning persons charged with crimes in state courts. This case presents a question of due process which, as far as it can be determined, has not heretofore been decided by this Court, but should be; and, the case presents a unique opportunity for a clear statement on just what acts can be classified as being fundamentally unfair.

### I. The Application Of A Newly-Enacted Statute To A Criminal Case, Ordered Dismissed Before Enactment Of The Statute But Before Actual Dismissal, Is A Clear Violation Of The Due Process Clause Of The Fourteenth Amendment.

The decision of the Supreme Judicial Court resulting in an order that the case be remanded for dismissal was entered on April 14, 1998. Thereafter, on April 23, 1998, the Massachusetts Legislature enacted Chapter 98 of the Acts of 1998. This statute, entitled, "An Act Relative To The Prosecution of

Juvenile Offenders," contained an emergency preamble. Accordingly, it became effective the same day it was signed by the Governor, April 23, 1998.

The newly-enacted statute was a direct response to the decision of the Supreme Judicial Court handed down on April 14, 1998; and, the statute extended the jurisdiction of the juvenile courts of Massachusetts over persons, regardless of age, whose adjudication of delinquency was reversed on appeal and remanded for a new trial.

Prior to this latest decision of the Supreme Judicial Court concerning petitioner it was very clear that the controlling statute was that which was in effect at the time the crime was committed. The Supreme Judicial Court reiterated this fact in the second *Santiago* case. *Santiago* v. *Commonwealth*, 427 Mass. 298 (1998). It would appear that this court is of the same view. *Weaver* v. *Graham*, 450 U.S. 24, 25 (1981). The statute in effect when the crime was committed was G.L.c. 119, Section 72 as amended by Chapter 398 of the Acts of 1992. This statute had no savings clause. It stated in no uncertain terms that the juvenile courts of Massachusetts would no longer have jurisdiction over an individual once he reached the age of nineteen.

Yet, when it appeared that the petitioner, who had been adjudicated delinquent by reason of murder, was about to be released because he was too old to be retried, the Supreme Judicial Court disdained due process and completely ignored the rule concerning which statute controlled. In effect, by its ruling, the Supreme Judicial Court was saying that it is now permissible to close the barn door after the horse is gone. Clearly, this flies in the face of due process.

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). The statute was passed by the Legislature to plug a hole found by the court. To apply the statute to plug that same hole is, without doubt, fundamentally unfair. It would be as unfair to apply the newly-enacted statute to the peti-

tioner as it was for an appellate court to affirm a conviction on appeal on a theory upon which the case was not tried. Due Process would not so permit. *Dunn* v. *United States*, 442 U.S. 100 (1979).

The petitioner does not suggest that retroactive application of a statute is prohibited in every type of case. Indeed, this court has permitted retroactive application of an amendment to a federal estate tax statute. *United States* v. *Carlton*, 512 U.S. 26 (1994).However, as stated in the beginning, a diligent search has not produced a case in which this court has held that such retroactive application is permissible in a criminal case. This case squarely presents the question.

## II. Retroactive Application Of The Statute Violates The Ex Post Facto Provision Of The Constitution.

One part of the classical meaning of ex post facto is that the new law would result in a change or alteration in the evidence which would work to the disadvantage of the petitioner. *Calder* v. *Bull*, 3 Dall. 386 (1798). And, it matters not that the new statute is considered procedural or substantive. *Collins* v. *Youngblood*, 497 U.S. 37 (1990).

Vilma Flores was shot and killed at the Carter Playground on Columbus Avenue in the South End Section of the City of Boston. The shooting occurred as a result of a confrontation between two groups, the Mozart Group and the Villa Group. Ludwin Midence, an adult, was with the Mozart Group and the petitioner with the Villa Group. Midence was engaged in threatening members of the Villa Group. At some point Midence pulled out a gun and a member of his group yelled, "Take them out." From all that appears, Midence fired first and petitioner responded by firing his weapon.

The Commonwealth was unable to present definitive evidence as to the exact position of Vilma Flores when she was struck by a bullet. Nor was the Commonwealth able to present definitive evidence as to which party fired the fatal bullet. Even so, the Commonwealth opted to try and prove that the

petitioner fired the fatal shot; therefore, petitioner was charged with murder and Midence was charged with manslaughter. In so doing, the Commonwealth was relying upon the cases of *Commonwealth* v. *Campbell*, 7 Allen 541 (1863) and *Commonwealth* v. *Balliro*, 349 Mass. 505 (1965), 209 N.E.2d 308. Essentially, both cases were understood to hold that if an innocent victim is killed during a shoot-out, only the person firing the fatal shot could be charged with murder.

Petitioner presented the defense of self-defense at trial. He maintained that Midence fired the first shot and that he returned the fire in self-defense. He attempted to introduce into evidence the fact that Midence had entered a guilty plea to a charge of armed assault with intent to murder wherein petitioner was the named victim. Because of a ruling in the first *Santiago* case the defense of self-defense has been eliminated.

In *Commonwealth* v. *Santiago*, 425 Mass. 491 (1997), 691 N.E.2d 1205 the court held that on retrial the Commonwealth could proceed on the theory that if two people engaged in a shoot-out resulting in the death of a bystander, both could be charged and convicted of murder regardless of who fired the fatal shot. This was reiterated by the court in *Santiago* v. *Commonwealth*, 428 Mass. 39 (1998) 697 N.E.2d 979. This being true, the petitioner has lost the only defense available to him.

To be sure, the new statute in and of itself does not take away the defense. It is the application of the statute to the petitioner who faces a retrial, and but for the statute, he would not be in that position; and, he is in this position because of an interpretation of the law which is different from that relied upon by both parties during the original trial. Thus, this case is similar, in effect, to *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964) where this court extended the ex post facto clause to judicial statutory constructions.

III. THE DUE PROCES CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS THE JUSTIFIABLE RELIANCE UPON AN INTERPRETATION OF THE LAW REGARDING MURDER, AND PREVENTS RETRIAL BASED UPON A SUBSEQUENT INTERPRETATION.

In deciding upon what theory to prosecute petitioner the Commonwealth relied upon its interpretation of *Commonwealth* v. *Campbell, supra* and *Commonwealth* v. *Balliro, supra.* In *Campbell* the prosecution arose from a Civil War draft riot in which a military force was called out to suppress the disturbance. An exchange of gunfire between rioters and soldiers resulted in a homicide for which the defendant, one of the rioters, was charged with manslaughter. The Commonwealth requested an instruction, telling the jury that, if the defendant had participated in the riot, and during an attack by the mob, the homicide occurred, the defendant was guilty even though the evidence failed to show whether the lethal shot was fired by a rioter or a soldier. The court rejected the request and proceeded on the principle that, "No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose." *Id.*, at 544.

In *Balliro*, the defendant and two accomplices armed themselves and broke into an apartment where police officers had been stationed to protect a woman and two children. A gunfight broke out between the officers and the invaders, during which the woman and one of the children were killed. At the conclusion of the joint murder trial, each defendant requested an instruction that he could not be found guilty of murder unless the bullet which caused the death of the woman or the child came from a gun held by one of the defendants. The trial judge refused to give the instruction. Refusing to depart from *Campbell*, the Supreme Judicial Court reversed the convictions.

To be sure, the Supreme Judicial Court, in *Santiago* v. *Commonwealth*, 428 Mass. 39 (1998), in effect, held that the reliance upon *Campbell* and *Balliro*, was misplaced. However, this is not the point. The point is, the Commonwealth *did* rely upon its interpretation of *Campbell* and *Balliro*, and the petitioner defended against that theory; and, it was reasonable for both parties to rely upon the past precedent. Having done so, it would be fundamentally unfair to permit a retrial where the Commonwealth could advance another theory, one which would certainly assure a conviction and upon which the petitioner could not defend. And, which has been endorsed by the highest state court. As the First Circuit said:

> At times a decision not only makes law, it effects a Volteface. Even in such cases, retroactivity would still provide for the most uniform application of the new, correct legal standards, but that interest in uniformity is outweighed by the need to protect justifiable reliance on a contrary seemingly authoritative view of the law.

*Simpson* v. *Director, Office of Workers' Compensation Program*, 681 F.2d 81, 85 (1st Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). Protecting justifiable reliance is even more important when a criminal statute is at issue. *Marks* v. *United States*, 430 U.S. 188 (1977).

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts should be granted.

Respectfully submitted,

By His Attorney,

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## APPENDIX A

428 Mass. 39 (1998)

FELIX SANTIAGO
*v.*
COMMONWEALTH.

SUFFOLK, JUNE 10, 1998 - JULY 21, 1998.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

*John P. Zanini*, Assistant District Attorney *(James W. Coffey*, Assistant District Attorney, with him) for the Commonwealth.

*Willie J. Davis* for Felix Santiago.

The following submitted briefs for amici curiae:

*Scott Harshbarger*, Attorney General, & *Carolyn D. Keshian*, Assistant Attorney General, for the Attorney General.

*Catherine E. Sullivan*, Assistant District Attorney, & *Loretta M. Lillios*, Assistant District Attorney, for Massachusetts District Attorneys' Association.

*Michael J. Sullivan*, District Attorney, & *Robert C. Thompson*, Assistant District Attorney, for the District Attorney for the Plymouth District.

*Willie J. Davis* for Stephen DiRenzo.

*Eric Brandt* for Committee for Public Counsel Services.

*John M. Thompson* for Massachusetts Association of Criminal Defense Lawyers.

ABRAMS, J. In 1996, a juvenile, Felix Santiago, was found delinquent by reason of murder in the first degree as well as other charges. In 1997, we reversed the juvenile's adjudication of delinquency because of the prosecutor's improper closing argument and ordered a new trial. *Commonwealth* v. *Santiago*, 425 Mass. 491 (1997) *(Santiago I)*. Shortly thereafter, the juvenile, who had reached the age of nineteen, argued in the Juvenile Court that he had "aged out" of the Juvenile Court's jurisdiction under the law as it existed at the time of

his alleged ofense. See G.L. c. 119, § 72 (1994 ed.) (providing that Juvenile Court has no jurisdiction over a juvenile after his or her nineteenth birthday). The Juvenile Court judge disagreed, concluding that a 1996 amendment provided for jurisdiction. See G.L. c. 119, § 72 (1996 ed.), as amended by St. 1996, c. 200, § 13 *(b)* (extending jurisdictional age limit to twenty-one years). The juvenile petitioned a single justice of this court under G.L. c. 211, § 3, and the single justice reserved and reported the matter to this court. We concluded that the amending statute, enacted after the alleged offense, did not apply to this juvenile because the Legislature explicitly did not intend it to be retroactive. Accordingly, we ordered that the indictment be dismissed. *Santiago* v. *Commonwealth*, 427 Mass. 298 (1998) *(Santiago II)*. On the Commonwealth's motion, a single justice of this court stayed the dismissal of the indictment. The Legislature then enacted St. 1998, c. 98, which purports to extend the Juvenile Court's jurisdiction retroactively so as to cover, among others, the juvenile's case. See St. 1998, c. 98, §§ 3, 5. We heard the parties on issues arising from St. 1998, c. 98, §§ 3 and 5. The juvenile argues that c. 98 is an ex post facto law in violation of art. I, § 9, of the United States Constitution and art. 24 of the Massachusetts Declaration of Rights, and that retrial would subject him to double jeopardy. We disagree. We remand the case to the Juvenile Court for trial.

It is plain that the Legislature intended §§ 3 and 5 of c. 98 to have retroactive effect.[1] The juvenile's case "was properly

[1] Chapter 98 of St. 1998 provides, in relevant part: "SECTION 3. Notwithstanding any language contained in [G. L. c. 119, § 72,] relating to the age limitation for persons over whom the juvenile court may exercise power and authority . . . the divisions of the juvenile court department and the juvenile sessions of the trial courts shall continue to have jurisdiction over persons whose cases were properly commenced in juvenile court, regardless of the current age of the person charged, pending final adjudication of such cases, including all remands and retrials following appeals from such cases. . . .

"SECTION 5. Section 3 of this act shall apply to complaints filed and indictments returned for offenses allegedly committed between December 31, 1991 and September 30, 1996, inclusive. . . ."

commenced in juvenile court," the crime was "allegedly committed between December 31, 1991 and September 30, 1996," and final adjudication was still pending due to the stay of the dismissal.[2] Therefore, the Juvenile Court has jurisdiction pursuant to c. 98 to retry the juvenile's case, if c. 98 is valid.[3] We conclude that it is.

In the "primordial" case of *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court identified four kinds of criminal laws as ex post facto: "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less or different testimony than the law required at the time of the commission of the offence, *in order to convict the offender.*" (Emphasis in original.) *Id.* at 390. See *Collins* v. *Youngblood*, 497 U.S. 37, 42-43, 47-52 (1990) (reaffirming that *Calder* provides the authoritative interpretation of the Federal ex post facto clause and overruling cases to the contrary); *Commonwealth* v. *Bargeron*, 402 Mass. 589, 590-591 (1988). As we noted in *Santiago II*, *supra* at 301, we have treated the Federal and State ex post facto clauses identically.

Chapter 98, which extends the Juvenile Court's jurisdiction, is procedural in nature and does not fall into any of the *Calder* categories. It neither renders previously innocent conduct criminal, nor retroactively increases the penalty for a crime, not alters the evidentiary standard in such a way as to make

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[2] Statute 1998, c. 98, cannot apply, however, to defendants whose cases were dismissed before the statute was enacted. The Legislature may not revive jurisdiction over a case that has already been dismissed. Cf. *Commonwealth* v. *Rocheleau*, 404 Mass. 129, 130-131 (1989).

[3] The Commonwealth also argues that, pursuant to G.L. c. 211, §§ 4A, 8, and 14, we can try the juvenile in this court or transfer the case to the Superior or Juvenile Court. Although this claim may provide an alternate basis for jurisdiction, we do not rely on it nor do we discuss it.

conviction easier. We therefore conclude that c. 98 is not an ex post facto law under either the Federal or State Constitution. See *Santiago II, supra* at 301, (statute increasing jurisdictional age limit not ex post facto); *Bargeron, supra* (statute extending limitations period not ex post facto).

Although both the statutes setting the Juvenile Court's age limits and statutes of limitations prescribe time limits, they do not operate in the same way. The former are jurisdictional, defining and limiting only the Juvenile Court's power over the individual. See *Santiago II, supra* at 302 (discussing "the Juvenile Court's jurisdictional limits as . . . prescribed by the Legislature"). Statutes of limitations, by contrast, impose a time limit on the prosecution. When a statute of limitations expires, the case is dead, and the Legislature may not revive it by amending the statute of limitations. *Commonwealth* v. *Rocheleau*, 404 Mass. 129, 130-131 (1989). When a juvenile reaches the age limit, the case is still alive until judgment enters resolving the case. Thus, there is no reason why the Legislature may not extend the Juvenile Court's jurisdiction over pending cases. Moreover, because there is no statute of limitations in a murder case, there was no bar to trying the juvenile in the Juvenile Court. See *D'Urbano* v. *Commonwealth*, 345 Mass. 466, 467-472 (1963). At all times, therefore, there was a court with jurisdiction over the juvenile. In c. 98, the Legislature merely added another court. Accordingly, the juvenile may be retried in the Juvenile Court pursuant to c. 98.

1. We reject the juvenile's contention that retrial would subject him to double jeopardy. *Breed* v. *Jones*, 421 U.S. 519 (1975), on which the juvenile relies, involved a juvenile who was transferred to his State's adult courts for a second trial after being adjudicated delinquent in a Juvenile Court. By contrast, this case involved a retrial after the juvenile's successful appeal in *Santiago I, supra*. This case presents no double jeopardy issue.

2. Our disposition requires us to consider another argument advanced by the juvenile. In *Santiago I, supra* at 503-504,

we rejected the juvenile's argument that, because the Commonwealth could prove neither that he instigated the shootout in which a bystander was killed nor that he fired the fatal shot, he was entitled to a required finding of not guilty. We stated that "[b]y choosing to engage in a shootout, a defendant may be the cause of a shooting by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides." *Id.* at 504. The juvenile argues that application of this principle to him at retrial would violate the ex post facto prohibition. We disagree.

The constitutional prohibition of ex post facto laws "is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts." *Stokes* v. *Commonwealth*, 368 Mass. 754, 772 (1975), quoting *Frank* v. *Mangum*, 237 U.S. 309, 344 (1915). The due process clause, however, prohibits retroactive application of a judicial decision "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.' " *Stokes, supra* at 773, quoting *Bouie* v. *Columbia*, 378 U.S. 347, 354 (1964). See *Commonwealth* v. *Moreira*, 388 Mass. 596, 601 (1983), quoting *State* v. *Koonce*, 89 N.J. Super. 169, 185 (1965) ("[I]t would be fundamentally unjust to render criminal, by an overruling decision, conduct which was not criminal when it occurred. This would be equivalent in effect on the accused of an *ex post facto* statute"). Applying these principles, we conclude that the law set forth in *Santiago I, supra*, may be applied to the juvenile.

The juvenile relies primarily on *Commonwealth* v. *Campbell*, 7 Allen 541 (1863), to support the argument that *Santiago I* worked a change in the law. In *Campbell*, a person was killed during a shootout between rioters, including the defendant, and soldiers who had been called out to suppress the riot. It could not be determined whether a rioter or a soldier had fired the fatal shot. We held that "[n]o person can be held guilty of homicide unless the act is either actually or

constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose," *id.* at 544, and directed that the jury "be instructed that, unless they [were] satisfied beyond a reasonable doubt that the deceased was killed by means of a gun or other deadly weapon in the hands of the prisoner, or of one of the rioters with whom he was associated and acting, he [was] entitled to an acquittal." *Id.* at 547-548. We reaffirmed this position in *Commonwealth* v. *Balliro*, 349 Mass. 505, 515 (1965), another case involving a shootout between persons engaged in criminal activity and law enforcement officials attempting to quash that activity.

By contrast, the juvenile's opponent in the shootout, rather than attempting to put a stop to criminal activity, was engaged in it himself. *Campbell* and *Balliro* accordingly cannot be said to have precluded, or to have been overruled by, *Santiago I*. Indeed, there is language in *Campbell* undermining the juvenile's position. See *Campbell*, *supra* at 547 (distinguishing an "obscurely and imperfectly reported" riot case: "both parties or sides had a common object in view, namely, a breach of the peace, and that both went out by an agreement or mutual understanding to engage in any affray or riot. . . . [A]s in the case of a duel, although to accomplish the common purpose they took opposite sides, still they might all well have been deemed to have confederated together in an unlawful enterprise, and thus to have become responsible . . . for a criminal act done in pursuance of the common design by any one of their confederates, with whichever side he may have acted in the affray"). The juvenile cannot reasonably argue that his participation in the shootout was innocent at the time and only became criminal after our decision in *Santiago I*. See *Santiago II*, *supra* at 300 nn.5-6.[4]

[4] We emphasize that *Santiago I* does not contemplate holding the juvenile liable for his opponent's acts on a joint venture theory. Rather, *Santiago I* states that the juvenile may be found guilty for *his own* act, namely, engaging in the shootout that caused the victim's death.

We conclude that *Santiago I* did not change the substantive law adversely to the juvenile.[5] There is no constitutional prohibition against retrying the juvenile on the theory set forth in *Santiago I*.

3. Our order dismissing the indictment is vacated. The case is remanded to the Juvenile Court for trial.

*So ordered.*

[5] Because this case is distinguishable on its facts from *Commonwealth* v. *Campbell*, 7 Allen 541 (1863), we have no need to reconsider the *Campbell* holding. However, we express grave doubt as to the continuing validity of the principle set forth in *Campbell*.

427 Mass. 298 (1998)

FELIX SANTIAGO

*v.*

COMMONWEALTH.

SUFFOLK, MARCH 9, 1998. - APRIL 14, 1998.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

*Juvenile Court*, Jurisdiction. *Practice, Criminal*, Juvenile delinquency proceeding. *Delinquent Child. Jurisdiction*, Juvenile delinquency proceeding. *Constitutional Law*, Ex post facto. *Due Process of Law*, Retroactive application of statute. *Statute*, Amendment, Retroactive application, Construction.

The provisions of the 1996 amendment to G.L. c. 119, § 72, as appearing in St. 1996, c. 200, § 13 *(b)*, which extended the Juvenile Court's jurisdiction over certain juvenile defendants until their twenty-first birthday, were clearly applicable only prospectively, that is, only to offenses allegedly committed on or after October 1, 1996, with the result that the Juvenile Court lacked jurisdiction to retry a twenty year old defendant whose conviction for a murder occurring on June 5, 1994, was reversed on appeal. [301-303]

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on February 4, 1998.

The case was reported by *Fried*, J.

*Willie J. Davis* for the plaintiff.

*John P. Zanini*, Assistant District Attorney *(James W. Coffey*, Assistant District Attorney, with him) for the Commonwealth.

IRELAND, J. A jury in the Boston Juvenile Court found Felix Santiago (defendant) delinquent by reason of several charges, including murder in the first degree.[1] The charges stemmed from a criminal episode that occurred on June 5, 1994, when

[1] The defendant was the subject of a transfer hearing in which the Commonwealth sought to have the indictments against him tried as criminal matters in the Superior Court. A Juvenile Court judge denied the transfer, and, hence, the indictments were tried as juvenile matters. See *Commonwealth* v. *Santiago*, 425 Mass. 491, 492 n.1 (1997).

the defendant was sixteen years old.[2] At that time, the Juvenile Court's jurisdiction over the defendant, while the case against him was pending, extended until his nineteenth birthday. See G.L. c. 119, § 72, as amended through St. 1992, c. 398, §§ 4, 5 ("Nothing [in G.L. c. 119] shall . . . give any division of the juvenile court department any power or authority over a person after he has attained his nineteenth birthday").

On July 21, 1997, nine days shy of the defendant's twentieth birthday, we reversed the murder conviction (the only conviction appealed from) and remanded the matter to the Juvenile Court for a new trial. See *Commonwealth* v. *Santiago*, 425 Mass. 491 (1997). The defendant then moved in the Juvenile Court to dismiss the murder indictment, arguing that the Juvenile Court lacked jurisdiction to retry him because he had since attained his nineteenth birthday.

The Juvenile Court judge disagreed and, so, denied the motion. In effect, the judge reasoned that the 1996 amendment to G.L. c. 119, § 72, as appearing in St. 1996, c. 200, § 13 *(b)*, which extends the Juvenile Court's jurisdiction over certain juvenile defendants until their twenty-first birthday, applied to the defendant, whose case remained pending. The defendant next petitioned a single justice of this court for relief under G.L. c. 211, § 3, claiming that no other avenue of appellate relief was available to him should he be tried by the Juvenile Court and once again be found delinquent by reason of murder. The single justice reserved and reported the matter to the full court for determination.

Simply put, the question before us is whether the Juvenile Court's jurisdiction over the defendant terminated when the defendant turned nineteen (according to G.L. c. 119, § 72 [1994 ed.], in effect at the time of the incident) or whether

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[2] The defendant was born July 31, 1977.

[3] "Under the common law and the law of the Commonwealth, each year a person attains his or her next age on the day before the anniversary of his or her birth." *Apkin* v. *Treasurer & Receiver Gen.*, 401 Mass. 427, 428 n.3 (1988).

jurisdiction continues until the defendant reaches the age of twenty-one on July 30, 1998[4] (see G.L. c. 119, § 72 [1996 ed.]). Stated another way, the question is whether the present statute is to have retroactive effect, thus giving the Juvenile Court jurisdiction until July 30, 1998, to retry the defendant and, if found delinquent, to commit him to the Department of Youth Services.

The defendant argues that retroactive application would violate ex post facto provisions in art. 1, § 10, of the Federal Constitution and art. 24 of the Massachusetts Declaration of Rights. In support of that contention, he suggests that retroactive application would adversely affect certain substantive rights he might have at a retrial, including the right to pursue the same theory of defense he used in his first trial, viz., that he did not initiate the shootout in which the victim was killed and did not fire the fatal shot but, rather, returned fire in self-defense.[5]

The Commonwealth counters that the measure extending Juvenile Court jurisdiction over certain defendants until their twenty-first birthday is fundamentally procedural in nature and does not adversely affect any of the defendant's substantive rights. Hence, it does not offend constitutional prohibitions against ex post facto laws. Retroactive application of the new provision, according to the Commonwealth, touches none of the special instances described in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), that make out the usual ex post facto violation.

The provisions within St. 1996, c. 200, § 13 *(b)*, do not retrospectively make criminal an act that was *not* criminal

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[4] See note, 3, *supra*.

[5] In *Commonwealth* v. *Santiago*, *supra* at 504, we rejected that theory, stating that a defendant who "choos[es] to engage in a shootout . . . may be the cause of a shooting by either side because the death of a bystander is a natural result of a shootout [which] could not occur without participation from both sides." We also stated that the Commonwealth could proceed on retrial on the theory that the defendant could still be found guilty of murder in the frist degree even if his opponent fired the fatal shot. *Id.* at 503 & n.5.

when done; do not aggravate or make greater any particular criminal offense; do not increase the punishment for any criminal offense; and do not alter the evidentiary burden required for conviction of a crimin offense or eliminate a defense available when a particular crime was committed.[6] See *Commonwealth* v. *Bargeron*, 402 Mass. 589, 590-591 (1988), quoting and discussing *Calder* v. *Bull*, *supra* at 390. See also *Collins* v. *Youngblood*, 497 U.S. 37, 42 50-52 (1990), overruling two earlier Supreme Court cases that had expanded ex post facto protections beyond the formulation in *Calder* v. *Bull*, *supra*, and reemphasizing that the meaning of the Federal ex post facto clause may be found exclusively in the *Calder* decision.

Our cases have treated the ex post facto provisions within the State and Federal Constitutions in identical fashion. See *Commonwealth* v. *Fuller*, 421 Mass. 400, 408 (1995); *Commonwealth* v. *Kelley*, 411 Mass. 212, 214 (1991); *Commonwealth* v. *Bargeron*, *supra* at 590. In so doing, we have relied consistently on "[t]he classical exposition of an ex post facto law [within] the primordial case of *Calder* v. *Bull*," *Commonwealth* v. *Bargeron*, *supra*, as an authoritative statement of the subject, as did the Supreme Court in *Collins* v. *Youngblood*, *supra*. Applying the *Calder* formulation here we can safely say that retrospective application to the defendant of the current § 72 would violate neither his right to be free of an ex post facto law or, for that matter, his right to due process. From Federal or State consitutional standpoints then, the Commonwealth is not barred from retrying the defendant before the Juvenile Court. The inquiry, however, does not end there.

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[6] *Commonwealth* v. *Santiago*, *supra* at 504-505, does *not* represent an abrupt or unanticipated departure from established precedent that recognized the sort of defense used in the first trial. The defendant cannot seriously contend that retroactive application of the reasoning in *Commonwealth* v. *Santiago*, *supra*, would deprive him of a viable defense available to him at the time he allegedly committed the crime.

"Absent clear language to the contrary it is presumed that legislation is not intended to operate retroactively." *Commonwealth* v. *Fuller*, *supra* at 407-408. That is so, even if, as here, ex post facto considerations play little or no decisive role. See *Nantucket Conservation Found., Inc.* v. *Russell Mgmt. Inc.*, 380 Mass. 212, 214 (1980). Cf. *Commonwealth* v. *Davis*, 380 Mass. 1, 16 (1980) (court "does well to tread lightly" in applying statutory amendments retroactively if doing so might implicate ex post facto provisions in State and Federal Constitutions).

Chapter 200 of St. 1996 (1996 Act) fundamentally changed the manner in which the cases of juveniles accused of committing violent crimes are to be handled in this Commonwealth. See generally R.L. Ireland, Juvenile Law §§ 1-3 (Supp. 1996). The 1996 Act was passed with an emergency preamble making some of its provisions immediately effective on final approval, which occurred on July 27, 1996. Through § 39 of the 1996 Act, the remaining provisions (including § 13 *[b]*, extending Juvenile Court jurisdiction in certain instances to persons aged twenty-one) did not become effective until October 1, 1996. The 1996 Act, thus, was plainly intended by the Legislature to operate *prospectively* from the date of passage (but with the majority of the provisions not becoming effective until October 1, 1996, more than two months *after* passage).

On November 28, 1997, some sixteen months after passing the 1996 Act, the Legislature stated once again its intent that § 13 of the 1996 Act was *not* effective prior to October 1, 1996. The Legislature also addressed any ambiguities in the original bill as to whether the provisions of the 1996 Act could be made to apply to crimes committed prior to the October 1, 1996, effective date. The Legislature declared:

> "Sections 1 to 13, inclusive, and sections 16 to 38, inclusive, of chapter 200 of the acts of 1996 shall apply to complaints filed and indictments returned *for offenses allegedly committed on or after October 1, 1996*" (emphasis supplied).

St. 1997, c. 208, § 2. We would be hard pressed to find a clearer expression of the Legislature's wishes on the subject, which are that the amendment to G.L. c. 119, § 72, here at issue, applies only to offenses allegedly committed "on or after October 1, 1996" — more than two years after the offense that occurred here. See *Commonwealth* v. *Fuller*, *supra* at 410, wherein we held that a legislative provision that an earlier amendment to G.L. c. 119, § 72, effective December 31, 1991, meant that the amendment "appl[ies] only to offenses committed on or after that date." It follows that G.L. c. 119, § 72 (1994 ed.), applies to the defendant. Because the defendant is now over the age of nineteen, the Juvenile Court lacks jurisdiction to conduct a retrial.

We have consistently declined to expand the Juvenile Court's jurisdictional limits as those have been prescribed by the Legislature through differing versions of G.L. c. 119, § 72, even though that, at times, has meant that a juvenile who has "aged out" of the Juvenile Court's jurisdiction has escaped prosecution altogether. See *Johnson* v. *Commonwealth*, 409 Mass. 712, 716-717 (1991) (Juvenile Court had no jurisdiction over juvenile who committed crime before his seventeenth birthday, where proceedings against him were not completed prior to his eighteenth birthday); *Commonwealth* v. *A Juvenile*, 406 Mass. 31, 33-34 (1989) (same result). But see *D'Urbano* v. *Commonwealth*, 345 Mass. 466, 470, 472 (1963) ("no provision which in terms gives jurisdiction over a child apprehended when under seventeen and not brought to trial until after eighteen"; "absence of valid juvenile procedures did not deprive the Superior Court of jurisdiction").

Counsel for the defendant concedes that his client will go free if we are to conclude, as we now do, that G.L. c. 119, § 72 (1994 ed.), applies in this case. We are constrained to arrive at this result by clear language in the statute. A judgment is to enter in the county court directing that the indictment be dismissed.

*So ordered.*

425 Mass. 491 (1997)

COMMONWEALTH

*v.*

FELIX SANTIAGO.

SUFFOLK, APRIL 9, 1997. - JULY 21, 1997.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, & FRIED, JJ.

On appeal to the jury session of the Boston Juvenile Court, the case was tried before *John P. Corbett*, J.

*Willie J. Davis* for the defendant.

*Katherine E. McMahon*, Assistant District Attorney (*James W. Coffey*, Assistant District Attorney, with her) for the Commonwealth.

FRIED, J. The defendant Felix Santiago, a juvenile, was indicted for the murder of Vilma Flores; armed assault with the intent to murder, and assault by means of a dangerous weapon on Ludwin Midence; unlawful possession of a firearm; and unlawful possession of ammunition.[1] The defendant waived his right to a jury trial in the first instance, and was adjudicated delinquent on all counts after a bench trial. He then claimed a jury trial and moved to dismiss the murder indictment. That motion was denied and the defendant sought relief from this court. See *Santiago* v. *Commonwealth*, 422 Mass. 1012 (1996). He was unsuccessful. A jury in Boston Juvenile Court then found the defendant guilty of all five counts. The defendant was sentenced to a twenty-year term of commitment on the murder conviction, and was committed to the Department of Youth Services on the remaining convictions. The defendant appealed from only the conviction of murder in the first degree.[2] We reverse the conviction.

[1] The Commonwealth sought to transfer the juvenile so that he could be tried as an adult, but the motion judge, after a hearing, declined.

[2] The defendant is not entitled to review under G.L. c. 278, § 33E, because he was adjudicated delinquent as a juvenile on the theory of murder in the first degree. In *Patrick P.* v. *Commonwealth*, 421 Mass. 186, 194 (1995), we held that "a determination of delinquency by reason of murder

I

On June 5, 1994, the victim, four months pregnant, accompanied her fiance to Carter Playground in Boston to watch him play softball. The event took place one day before the victim's eighteenth birthday. Four teams were playing that day, and a crowd of approximately five hundred to one thousand people gathered to watch the games. Shortly after 5 p.m., the victim walked to the concession stand to buy food. On her way back, she passed two groups of men exchanging angry words on and near the sidewalk adjacent to Columbus Avenue. A witness identified the defendant, who was known to him, as a young Hispanic man straddling a bicycle between parked cars on Columbus Avenue near where the men were arguing.

According to a statement the defendant made to police, the defendant had seen a rival group of men at the park, and he had informed his friends of their presence. He was asked by his friend, one of the men who was later involved in the argument, to "go get something." At this direction, the defendant left to borrow a gun from a nearby video store and returned to the scene. What happened next is in dispute. An argument broke out between the defendant's friends and the other group. Apparently one of the men in the other group said, "take him out," referring to the defendant's friend. The defendant told the police that the men on the sidewalk fired first, but none of the witnesses to the shooting was able to determine which side fired first. It happened that four shots were fired from the area where the defendant was straddling his bicycle before his gun jammed, and several more shots were fired from the area where the other group was standing. As the victim walked past the two groups, she was struck by a bullet and killed. An eight year old boy playing within a few feet of the defendant was shot in the leg. The bullet which killed the victim was never recovered, and therefore there was no

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is not a 'capital' case." General Laws c. 278, § 33E, provides for its special review only in "capital" cases.

conclusive forensic evidence as to whether the bullet which killed the victim was fired by the defendant or by one of the men in the other group. The Commonwealth sought to demonstrate at trial that the position of the victim when she was shot proved that the bullet came from the defendant's gun.

Defense counsel argued that the Commonwealth could not prove who fired the fatal shot, and that the defendant engaged in the shooting as an act of self-defense. He pointed to the fact that the defendant retrieved the gun only at the behest of an older friend, and argued that the defendant did not start firing until the other group threatened his friend and had fired the first shot.

II

The defendant's first argument is that the prosecutor, in his opening and closing statements as well as in calling the victim's sister as a witness, improperly appealed to the jury's sympathy for the victim in a way that may have "swe[pt] the jurors beyond a fair and calm consideration of the evidence." *Commonwealth* v. *Perry*, 254 Mass. 520, 531 (1926). The defendant points to five instances in which he claims the prosecutor improperly appealed to the sympathy of the jury.

1. *Repeated references to the age, birthday, and pregnancy of the victim.* The defendant claims that the prosecutor's repeated references to the victim's age, pregnancy, and birthday were improper and calculated to influence the jury to render a verdict based on emotion and sympathy for the victim rather than on a reasoned judgment based on the evidence at trial. In his opening statement, the prosecutor referred five times to the fact that the victim was seventeen years old and pregnant. In his closing, he referred to those same facts seven more times, and noted four times that the victim was to have a birthday one day after the shooting and that, coincidentally, her twentieth birthday corresponded with the day of the closing arguments in the trial. The defen-

dant objected at the end of both the prosecutor's opening and closing statements. The following portion of the prosecutor's closing argument is illustrative:

> "Because of [the defendant's] actions, [the victim] is dead. She no longer exists. She is not going to walk through that door today. . . . She is dead and buried. Murder is violent and it is final. And a [seventeen] year old girl, four months pregnant, is dead because of him and no one else. I want you to think about that. Seventeen years old, four months pregnant. It is unconscionable what he did that day. It is mind boggling. . . .
>
> "Today she would have been twenty years old. . . . Twenty years old today. I want you to think about that. She couldn't reach her [twentieth] birthday because of this guy right here who is wearing a shirt and tie. She would still be a kid, [twenty] years old. . . . It is mind boggling what he did that day and a pregnant girl is dead."

The prosecutor has a particular obligation not only to argue the Commonwealth's case forcefully and aggressively, but also to do so in a way that states the evidence clearly and fairly and inspires confidence that the verdict was reached based on the evidence rather than sympathy for the victim and her family. See *Commonwealth* v. *Shelley*, 374 Mass. 466, 472 (1978), citing *Berger* v. *United States*, 295 U.S. 78, 88 (1935), overruled on other grounds, *Stirone* v. *United States*, 361 U.S. 212 (1960). The prosecutor failed in that latter obligation by his repeated references to the victim's personal characteristics. Certainly the prosecutor is entitled to tell the jury something of the person whose life had been lost in order to humanize the proceedings.[3] In a case such as this where the victim's

[3] We note that there is support in other jurisdictions for the proposition that the prosecutor may introduce testimony to "humanize" the victim. See, e.g., *McQueen* v. *Commonwealth*, 669 S.W.2d 519, 523 (Ky.), cert. denied, 469 U.S. 893 (1984) ("It would, of course, behoove the [defendant] to be tried for the murder of a statistic, but we find no error in bringing to the

character and personal characteristics are not relevant to any material issue, however, the prosecutor is under an obligation to refrain from so emphasizing those characteristics that it risks undermining the rationality and thus the integrity of the jury's verdict. The prosecutor not only unnecessarily repeated the victim's age and the fact of her pregnancy throughout his arguments, he suggested that these facts were issues the jury should consider in their deliberations when he repeatedly stated to the jury in reference to these facts, "I want you to think about that."

The jury have the ability to discount hyperbole and other improper statements, see *Commonwealth* v. *Anderson*, 411 Mass. 279, 287 (1991), and the trial judge's instructions are generally adequate to cure errors in the arguments, see *Commonwealth* v. *Francis*, 391 Mass. 369, 373-374 (1984). Thus, in many cases, arguments by the prosecutor, while in error, are not unduly prejudicial. See, e.g., *Commonwealth* v. *Pontes*, 402 Mass. 311 (1988); *Commonwealth* v. *Depradine*, 42 Mass. App. Ct. 401, 409 (1997). Contrast *Commonwealth* v. *Graziano*, 368 Mass. 325, 332 (1975) (use of ethnic stereotypes in closing required reversal). In this case, however, the prosecutor repeatedly appealed to the jury's sympathy, and the cumulative effect of such appeals must be considered.

2. *Testimony of the victim's sister.* The judge denied a motion in limine to exclude the victim's family members from testifying on the grounds that none of them witnessed the events in question, and there was no issue as to identification of the victim. The victim's sister was the first witness called by the prosecution. She testified as to the victim's age, her relationship with her fiance, her pregnancy, and related that

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attention of the jury that the victim was a living person, more than just a nameless void left somewhere on the face of the community" where the testimony is not "emotional, condemnatory, accusative or demanding vindication"). But see *State* v. *Broughton*, 450 N.W.2d 874, 876 (Iowa 1990) ("we do not accept the State's argument that [testimony from the victim's family] should be received as a matter of course in order to 'humanize' the murder victim, [but] we cannot find sufficient prejudice in the rather innocuous biographical information").

the victim was in school and working, and that the family had just celebrated the victim's birthday. The victim's sister also testified that on the day her sister had been shot, she had gone to the hospital where she waited until she was told her sister died. After the witness testified, defense counsel moved for a mistrial on the ground that the testimony offered no relevant facts and was designed solely to elicit the jury's sympathy. The motion was denied. As the victim's sister left the witness stand, she walked to the front of the defense table and yelled at the defendant, "Murderer. You killed my sister." Defense counsel again moved for a mistrial which the judge denied. The judge explained to the jury that emotions are strong in a case such as this and he said, "I ask you to disregard that particular outburst. . . . Don't consider it in any way and don't even discuss it in your deliberations."

Both sides in a criminal trial have substantial latitude to try the case in their own way without significant interference so long as they engage in no calculated impropriety. *Commonwealth* v. *Andrews*, 403 Mass. 441, 451 (1988) (jury instruction adequate to cure unsolicited statement from defendant's mother, "That's Billy. He's my son and my friend. He was a kind and beautiful person. Why did you kill him?"). There is nothing in the record to suggest that the sister's outburst was planned or even that the prosecutor had any reason to suspect that the sister might react in this way. Defense counsel at trial recognized as much: "I know the district attorney didn't anticipate [the outburst] because we didn't have this below [at the jury-waived trial]." Whether to declare a mistrial in such circumstances is a decision within the sound discretion of the trial judge who is in the best position to determine whether the outburst would likely prejudice a jury. The judge in this case did not abuse his discretion in instructing the jury not to consider the outburst rather than declaring a mistrial.

The more troubling question is whether the judge erred in allowing the sister to testify at all. In cases such as this, there is no error where a member of the victim's family likely to

elicit sympathy testifies as to some relevant issue,[4] even a relatively peripheral one and even where another witness could have given the same information without evoking the same level of sympathy from the jury. See *Commonwealth* v. *Andrews, supra* at 450-451; *Commonwealth* v. *Harris*, 28 Mass. App. Ct. 724, 733 (1990), *S.C.*, 409 Mass. 321, 331-332 (1988). In *Commonwealth* v. *Gordon*, 422 Mass. 816, 830-831 (1996), however, while not finding prejudicial error, we "urge[d] caution in admitting evidence in criminal cases that appears to be more related to evoking sympathy [than] to proving the elements of the alleged crime or crimes." In this context, where the sister offered no testimony relevant to any contested issue, where the prosecutor made excessive pleas to sympathy in his arguments, and the sister was allowed to testify in substantial detail about the victim's life and her own experience concerning the victim's death, such testimony was improper. Although the introduction of this testimony alone might not be cause for reversal, the prejudicial effect of this testimony must be weighed along with the other errors in this trial. Such testimony takes on greater importance in a case such as this where the prosecutor consistently made improper appeals to the jury's natural sympathy for the victim. In addition, had the victim's sister not been asked to testify, she would not have been in the position to make the outburst she directed at the defendant at the end of her testimony.

3. *Repeated references to the children at the park and crowd reactions to the shooting.* The prosecutor made repeated references to the large crowd in the park, the fact

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[4] The threshold question for determining relevancy is whether the evidence has a "rational tendency to prove *an issue in the case*" (emphasis supplied). *Commonwealth* v. *Fayerweather*, 406 Mass. 78, 83 (1989). Irrelevant evidence is not admissible, see P.J. Liacos, Massachusetts Evidence § 4.1.2, 113-115 (6th ed. 1994), and even some relevant evidence may be excluded if the prejudicial value outweighs its probative effect. *Commonwealth* v. *Lewin (No. 2)*, 407 Mass. 629, 631 (1990). While the trial judge has substantial discretion in making these evaluations, see *Commonwealth* v. *Tobin*, 392 Mass. 604, 613 (1984), in this case, the lack of relevance is abundantly clear.

that there were many children running about, and that, after the shooting, "pandemonium" broke out. Such statements do not constitute error in this context. First, the prosecutor is entitled to set the scene, and several of the witnesses the prosecutor called testified to the facts the prosecutor described. The prosecutor would cross the line into impermissible argument if he were to stress repeatedly aspects of the scene that were highly prejudicial to the defendant but only peripherally relevant to the defendant's guilt or innocence. That was not the case here. The evidence that there were many people around including children may have prejudiced the defendant in the eyes of the jury, but the testimony was highly relevant to the defendant's guilt. Repeatedly firing a weapon near a large crowd is wanton and reckless behavior that may supply an element of murder in the second degree or of involuntary manslaughter, on both of which the jury were instructed as lesser included offenses of murder in the first degree. See *Commonwealth* v. *Raymond*, 424 Mass. 382, 390 (1997) (statements regarding the conscious suffering of the victim were proper even though they may have elicited the jury's sympathy because they were relevant to whether the murder was committed with extreme atrocity and cruelty).

4. *Personal belief of the prosecutor.* The defendant objects to three separate statements on this ground. First, the prosecutor stated, "I suggest to you I overwhelmingly proved who fired that fatal shot." Generally, there is no error in a prosecutor's describing the evidence presented as "overwhelming" or "undisputed." See *Commonwealth* v. *Shea*, 401 Mass. 731, 738-739 (1988). Although in this case, such a description may be difficult to reconcile with the evidence, assessing the strength of a case is a permissible part of marshaling the evidence and arguing forcefully for a conviction. Where, however, the prosecutor's argument focuses on his own subjective assessment of the evidence, greater concern is warranted. See *Commonwealth* v. *Daigle*, 379 Mass. 541, 550 (1980) ("strongly disapprove[d]" but found no reversible error regarding statement, "I think on all the evidence it is over-

whelming that this man is guilty . . . and I think that's the way you should find"). The statement in this case was similarly improper but less egregious because he did not tell the jury what to "find," and whatever prejudice it might have caused was alleviated in part by the judge's instructions that the jury was the sole judge of the facts.

The prosecutor also stated, "Ladies and gentlemen of the jury, the greatest tool in this business, as far as I'm concerned, is common sense." There is no error in this statement. Jurors should use common sense to assist in reaching their verdict. See *Commonwealth* v. *Cook*, 419 Mass. 192, 203 & n.9 (1994) (finding no error in prosecutor's statement which among other things encouraged the jurors to use their common sense). That the prosecutor interjected his personal belief in this context does not make the statement erroneous.

Third, the prosecutor, perhaps to counteract suggestions in defense counsel's closing that the defendant, in retrieving the gun, was acting at the directions of his older friends, stated "I think he's old enough to make decisions on his own." Defense counsel objected to the remark. Isolated slips by the prosecutor where he interjects a personal pronoun do not constitute serious error. See *Commonwealth* v. *Raymond*, *supra* at 391-392, citing *Commonwealth* v. *Thomas*, 401 Mass. 109, 115-116 (1987). The likelihood of prejudice here was particularly slight because the ability of a person of the defendant's age to make his own judgments would be a matter within the personal experience of jurors, and therefore the prosecutor's personal beliefs on the matter would be unlikely to affect the jurors' decision.

5. *Comment regarding fact not in evidence.* The prosecutor, in his closing argument stated:

> "I want you to envision this scene. This person who now sits ten feet from you has this loaded nine millimeter handgun two feet from an eight-year-old boy. That beautiful young kid who testified in front of you is two feet from this guy. I suggest to you that is is an incredibly

> insightful piece of evidence about what makes this guy tick. He doesn't care about anyone other than himself. He is willing to fire this gun two feet from an eight-year old boy's head. Think about that. That's what was testified to. That tells you a lot about this guy. *He is using an eight-year old boy as a shield;* and when that doesn't work he runs behind the car because he cares for no one but himself" (emphasis supplied).

It was entirely proper for the prosecutor to argue forcefully that it was reckless and wanton behavior for the defendant to engage in a shootout where an eight year old boy was exposed to the gunshots. The statement about using the child as a shield, however, was unwarranted by the evidence and highly inflammatory as it implied a direct intention to expose an innocent person to harm. Defense counsel objected to the statement.

References to facts not in the record or misstatements of the evidence have been treated as serious errors where the misstatement may have prejudiced the defendant. In *Commonwealth* v. *Lamrini*, 392 Mass. 427, 432-434 (1984), a new trial was required where the prosecutor argued to the jury that robbery, not self-defense, was the motive for a murder even though the evidence of robbery was speculative at best. In *Commonwealth* v. *Shelley*, 374 Mass. 466, 469-470 (1978), we reversed a conviction where the prosecutor argued that the defendant's expert witnesses had been "bought" by the payment of excessive fees, were "mercenary soldiers" and "prostitutes," although there was no evidence that the experts received a large fee. In both of these cases, the evidence was not overwhelming, the misstatement went to the heart of the case, and no specific curative instructions were given. Contrast *Commonwealth* v. *Richenburg*, 401 Mass. 663, 674-675 (1988) (argument that victim was tied to a column not based in evidence but not prejudicial where evidence indicated she had been tied up, but not to column).

## III

The standard for determining whether a conviction must be reversed is whether the improper statements made by the prosecutor "constituted prejudicial error." *Commonwealth* v. *Daggett*, 416 Mass. 347, 352 n.5 (1993). The cumulative effect of all the errors in the context of the entire arguments and the case as a whole is considered in making this determination. See *Commonwealth* v. *Loguidice*, 420 Mass. 453, 454 (1995); *Commonwealth* v. *Smith*, 387 Mass. 900, 912 (1983). The following factors are considered: whether defense counsel reasonably objected to the arguments at trial, *Commonwealth* v. *Kozec*, 399 Mass. 514, 518 (1987), whether the judge's instructions mitigated the error, *id.*; whether the errors in the arguments went to the heart of the issues at trial or concerned collateral matters, *Commonwealth* v. *Shelley*, *supra* at 470-471; whether the jury would be able to sort out the excessive claims made by the prosecutor, see *Commonwealth* v. *Bradshaw*, 385 Mass. 244, 277 (1982) ("The jury could be expected to take both arguments with a grain of salt"); and whether the Commonwealth's case was so overwhelming that the errors did not prejudice the defendant. *Commonwealth* v. *Clary*, 388 Mass. 593, 591 (1983).

Defense counsel in this case was particularly vigilant in responding to the prosecutor's arguments which might have inflamed the jury's emotions. He objected to the excessive references to the personal characteristics of the victim in the prosecutor's opening and closing statements. He objected to the victim's sister's testimony before and after she testified and asked for a mistrial after her outburst. He also noted the shield misstatement and most of the instances where the prosecutor's personal beliefs were arguably interjected. In contrast, the judge did not take an aggressive approach to correcting the prosecutor's errors. With the exception of a forceful statement to the jury to disregard the victim's sister's outburst, he never specifically addressed any of defense counsel's objections except to note them and promise "those things you usually

hear in instructions about arguments." In the instructions to the jury, the judge stated,

> "As I've said often in the course of this trial, the arguments of counsel, the opening statements of counsel, are not evidence. You may use them as they emphasize the things the lawyers think are important."

Without specifically mentioning sympathy or correcting the misstatement about using the boy as a shield, this general instruction is not enough to fully remedy the prosecutor's errors.

The trial focused on two issues: whether the defendant fired the shot that killed the victim and whether the actions of the other group justified the defendant's actions such that he would either be not guilty or guilty of a lesser crime than murder in the first degree. None of the issues discussed, with the exception of the prosecutor's assertion that he had "overwhelmingly" proven that the defendant fired the fatal shot, spoke directly to either of these issues. But that is the nature of appeals to sympathy: They do not misstate any piece of evidence, but rather obscure the clarity with which the jury would look at the evidence and encourage the jury to find guilt even if the evidence does not reach the level of proof beyond a reasonable doubt. Thus, the strength of the Commonwealth's case is particularly crucial where improper appeals to sympathy are made. Where guilt is clear, we may conclude that the overwhelming strength of the evidence led the jury to its conclusion, but where the questions are close and difficult, we cannot be certain that the jury's conclusion was not clouded by the improper appeals and that their verdict was based on a dispassionate view of the evidence.

In this case, the Commonwealth sought to prove that the defendant fired the shot that killed the victim and that he fired it with the premeditated intention to kill one of the men (Midence) on the sidewalk. The Commonwealth need not prove an intent to kill the vietim because intent could be transferred from the intent to kill one of the men on the sidewalk.

*Commonwealth* v. *Pitts*, 403 Mass. 665, 668-669 (1989). The Commonwealth's case of premeditated intent to kill a man on the sidewalk was strong, since the defendant had left the scene after he saw the men on the sidewalk and returned with a gun. Not only does this show premeditation, but it also tends to negate the defendant's claim that he was returning fire and shot in self-defense. Under the law of the Commonwealth, self-defense requires retreat, if possible, before resorting to deadly force. *Commonwealth* v. *Lapointe, supra* at 328-329. That the defendant was able to leave the park after encountering the men on the sidewalk demonstrated that he had ample opportunity to retreat. Although the case for premeditation is strong, the defendant might have returned with the gun only with the intent to frighten the others or to use it to protect himself if attacked. In such a scenario, the jury would have been justified in returning a verdict of murder in the second degree, manslaughter, or even not guilty based on self-defense. Therefore, it is at least possible that the prosecutor's invocation of sympathy and his statement regarding the use of the boy as a shield might have so inflamed the jury that they returned a verdict of murder in the first degree even though a dispassionate jury might have found the defendant not guilty based on self-defense, or guilty of a lesser crime.

As to the second issue, whether the defendant fired the fatal shot, the evidence at the trial was far from overwhelming. There was no conclusive forensic evidence and the Commonwealth's case was based solely on the position of the victim, as remembered by witnesses, relative to the shooters. Counsel for each side proceeded on the assumption that the Commonwealth would have to prove who fired the fatal shot, and in this appeal, the Commonwealth must adhere to the theory on which it tried the case, though it is not bound by it on retrial. Since there was less than certainty about whose shot killed the victim and the Commonwealth made this a central part of its case, there was ample room for passion to cloud the jury's judgment on this score. Since the Commonwealth's case as tried was not so overwhelming as to overcome the errors

committed by the prosecutor, and given the number of errors and their significance, we are not satisfied that the defendant received a trial free of undue prejudice. There must be a new trial.

IV

We address several issues which are likely to arise at a second trial.

A

The defendant claims that he should be found not guilty as a matter of law because the Commonwealth can prove neither that he instigated the shootout nor that he fired the fatal shot. As to the first, while the Commonwealth must prove beyond a reasonable doubt that the defendant was not acting in self-defense, see *Commonwealth* v. *Beauchamp*, 424 Mass. 682, 685-690 (1997), it need not prove that the defendant fired the first shot. The defendant, after seeing the men on the sidewalk, left the scene to retrieve a gun and loaded it during an argument with those men. He chose to return to the park even though he must have known there was a high risk of violence, and he made no attempt to flee rather than join the shootout. These facts alone would be enough to permit the jury to infer premeditated intention to kill. See *Commonwealth* v. *Ruci*, 409 Mass. 94, 96-97 (1991).

As to the issue whether the defendant fired the fatal shot, where the defendant chooses to engage in a gun battle with another with the intent to kill or do grievous bodily harm and a third party is killed, the defendant may be held liable for the homicide even if it was the defendant's opponent who fired the fatal shot.[5] Thus, the inability to prove who fired the fatal shot would not be ground for a directed verdict. This conclusion is endorsed by standard jury instructions. The defendant's act must be "a cause, which, in the natural and

[5] There is no bar to the Commonwealth's proceeding at retrial on this theory. See *Commonwealth* v. *Arsenault*, 361 Mass. 287, 298 (1972). ("The Commonwealth made no binding agreement or stipulation locking itself into the theory of its first trial").

continuous sequence, produces the death, and without which the death would not have occurred." *Commonwealth* v. *Rhoades*, 379 Mass. 810, 825 (1980), quoting California Jury Instructions, Criminal § 8.55 (4th rev. ed. 1979). See also Model Jury Instructions For Use In The District Court § 5.635 (1995) ("By 'causing' the victims death, I mean that he must have directly and substantially set in motion a chain of events that produced the victim's death in a natural and continuous sequence and without which death would not have occurred"). The defendant's acts need not be the sole or exclusive cause of death. See *Commonwealth* v. *Rhoades*, *supra*. By choosing to engage in a shootout, a defendant may be the cause of a shooting by either side because the death of a bystander is a natural result of a shootout, and the shootout could not occur without participation from both sides.

B

The judge denied the defendant the opportunity to introduce the guilty pleas of the shooter on the sidewalk, Ludwin Midence. Midence pleaded guilty to manslaughter of the same victim, Vilma Flores, and to armed assault with the intent to kill the defendant. The defendant argues that these pleas support both his argument that the other shooter fired the fatal shot and that the defendant was acting in self-defense, so that the judge's refusal to admit the evidence of the convictions denied him due process. The admission of the convictions is within the discretion of the judge on retrial, although the defendant's contentions lose much of their force if the Commonwealth adopts the alternative theory open to it. Ordinarily, "in a criminal case the record of conviction or acquittal in another case to which the defendant was not a party is not admissible to establish the truth of any fact involved in such a conviction or acquittal." See *Commonwealth* v. *Tilley*, 327 Mass. 540, 548 (1951) (admission of conviction of principal by prosecution erroneous in trial of accessory). Admission of a guilty plea is of even less value because

the plea is often the result of bargaining with the prosecutor and is not necessarily the equivalent of an admission of full guilt for the act alleged. Where the defendant is seeking to introduce the evidence, its introduction might be required if it were critical to the determination of guilt or innocence, such as where another individual has pleaded guilty or been adjudged guilty of the same act for which the defendant is charged, and there is no theory of joint involvement available. See 1A J. Wigmore, Evidence § 142 (4th ed. 1983). In this case, there is no such reason to admit the evidence. As we have explained, there is no inconsistency in finding both shooters criminally responsible for this victim's death. As to the assault with intent to kill conviction, there was no contention by the prosecutor that the other shooter was acting in self-defense or in an otherwise lawful manner. The case proceeded on the theory that both shooters were trying to kill each other.

C

The defendant points to several errors he claims the judge made in instructing the jury. As to the reasonable doubt instructions, there is no error in the statement that proof beyond a reasonable doubt "[leave[s] you with a moral certainty, a clear and settled belief that the defendant is guilty and there is no other reasonable explanations of the facts as proven." Recent cases by this court and the United States Court clarify how the term "moral certainty" may be properly used, see, e.g., *Victor* v. *Nebraska*, 511 U.S. 1 (1994); *Commonwealth* v. *Bonds*, 424 Mass. 698 (1997), and its use here accords with those decisions.

The defendant makes a series of claims with regard to the malice instructions. First, the defendant claims that an instruction on the third prong of malice should not have been given because the conviction was premised on a theory of murder in the first degree. The judge instructed the jury that malice "includes any unexcused or unjustified specific intent . . . to do an act creating a plain and strong likelihood that

death or grievous bodily harm will follow." Third-prong malice is irrelevant where there is a conviction for murder in the first degree based on deliberate predetermination, see *Commonwealth* v. *Morgan*, 422 Mass. 373, 382 (1996), but that does not mean there is error in giving the instruction. The jury were properly instructed on the third prong of malice as part of the lesser included offense of murder in the second degree. The third prong of malice is clearly relevant to this fact situation where the defendant fired a gun several times in a setting crowded with innocent bystanders.[6]

At the prosecutor's request, the judge instructed the jury that they could infer malice and premeditation from the defendant's leaving the scene, returning with a gun, and using it. Such inferences are permissible. *Commonwelth* v. *Ruci*, 409 Mass. 94, 96-97. The judge may give an instruction to that effect, so long as it is phrased as a permissible inference, and a reasonable juror would understand it that way.

The defendant complains that the judge instructed first on self-defense and then on the elements of the crime, and that he refused to instruct specifically that in order to find the defendant guilty of either murder or manslaughter it must conclude that the defendant was not acting in self-defense. Although it is generally preferable to instruct on the elements of a defense to a crime after describing the elements to a crime, a specific order in jury instructions is not required. See *Commonwealth* v. *Raymond*, 424 Mass. 382, 385-388 (1997). Because the judge did give the self-defense instructions first, it would have been better to remind the jury at the end of the instructions that self-defense negated culpability and that the Commonwealth bore the burden of proving the lack of self-defense, and, in the context of this case, on retrial this should be done. Compare *Commonwealth* v. *Doucette*, 391

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[6] On retrial, the instructions on malice should conform to our statements in *Commonwealth* v. *Eagles*, 419 Mass. 825, 836 (1995), and *Commonwealth* v. *Fuller*, 421 Mass. 400, 412 (1995).

Mass. 443, 452 (1984), quoting *Commonwealth* v. *Peters*, 372 Mass. 319, 324 (1977) ("the law does not require repetition of the same thought at each turn").

V

The judgment is reversed, the verdict is set aside, and the case is remanded for a new trial.

*So ordered.*

## APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

# SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

At Boston, April 14, 1998

In the Case No. SJC-07681

FELIX SANTIAGO

v.

COMMONWEALTH

pending in the Supreme Judicial Court for the County of Suffolk No. SJC-98-0078 Civil

ORDERED, that the following entery be made in the docket; viz.,-

A judgment is to enter in the county court directing that the indictment be dismissed.

By the Court
s/Jean M. Kennett, Clerk

April 14, 1998

**APPENDIX C**

# SUPREME JUDICIAL COURT

## FOR THE COMMONWEALTH

1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Willie J. Davis, Esquire
Davis, Robinson & White
15 Court Square, Suite 960
Boston, MA 02108

RE: Docket No. SJC-07681

COMMONWEALTH

vs.

FELIX SANTIAGO

NOTICE OF DOCKET ENTRY

Please take notice that on July 21, 1998, the following entry was made on the docket of the above-referenced case:

MOTION to Stay Issuance of Rescript pending petition for certiorari, filed for Felix Santiago by Willie J. Davis, Esquire. July 27, 1998: ALLOWED. By the Court. Notice to counsel.

Jean M. Kennett, Clerk

Dated: July 27, 1998

To: James W. Coffey, A.D.A.
John P. Zanini, A.D.A.
Willie J. Davis, Esquire
S.J.C. for Suffolk County
Atty. Carolyn D. Keshian
Eric S. Brandt, Esquire
John M. Thompson, Esquire
Catherine E. Sullivan, Esquire
Robert C. Thompson, A.D.A.
Carolyn D. Keshian, Esquire

## APPENDIX D

### MASSACHUSETTS G. L. c. 211

**§3. Superintendence of inferior courts; power to issue writs and process**

The Supreme Judical Court shall have general superintendence of all courts of inferior judisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the futherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, the general superintendence shall not include the authority to supersede any general or specific law unless the supreme judicial court, acting under its original or appellate jurisdicition finds such law to be unconstitutional in any case or controversy; and provided, further that general superintendence also shall not include the authority or power to exercise or supersede any of the powers, duties and responsibilities of the chief justice for administration and management, as established by section one of chapter two hundred and eleven B, in any general or special law except under extraordinary circumstances leading to a severe, adverse impact on the administration of justice; provided, that the majority of the supreme judicial court shall issue a written order that sets forth the basis for a finding that, absent

such action, there would be a severe and adverse impact on the administration of justice in the commonwealth. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Amended by St.1992, c. 379, § 61.

## MASSACHUSETTS G. L. c. 119, Section 72

### As Amended By Chapter 398 of the Acts of 1992

**§ 72. Continuing jurisdiction; murder adjudication; suspension of commitment**

The divisions of the juvenile court department, shall continue to have jurisdiction over children who attain their seventeenth birthday pending a hearing under section sixty-one of this chapter, or adjudication of their cases, or pending hearing and determination of their appeals, or during continuances or probation, or after their cases have been placed on file; and if a child commits an offense prior to his seventeenth birthday, and is not apprehended until between his seventeenth and eighteenth birthdays, the court shall deal with such child in the same manner as if he had not attained his seventeenth birthday, and all provisions and rights applicable to a child under seventeen shall apply to such child; provided, that if said child is charged with a violation of murder in the first or second degree, manslaughter, or any violation of section twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five and is not apprehended until after his eighteenth birthday the court shall immediately conduct a hearing under the provisons of section sixty-one.

The divisions of the juvenile court department, shall continue to have jurisdiction over persons who attain their eighteenth birthday pending the determinations allowed under section sixty-one of the chapter, or pending adjudication of their cases, or pending hearing and determination of their appeals, or during continuances or probation, or after their cases have been placed on file. Nothing herein shall authorize the commitment or[1] a person to the department of youth services after he has attained his nineteenth birthday, or give any division of the juvenile court department any power or authority over a person after he has attained his nineteenth birthday.

[1] So in enrolled bill; probably should read "of".

If a child who has passed his fourteenth birthday is adjudicated a delinquent by reason of having violated section one of chapter two hundred and sixty-five shall if the adjudication is for murder in the first degree such child shall be committed to a maximum confinement of twenty years. Such confinement shall be to the custody of the department of youth services in a secure facility until a maximum age of twenty-one years and thereafter shall be to the custody of the dapartment of correction for the remaing portion of that commitment but in no case shall the confinement be for less that fifteen years and said child shall not be liable for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven until said child has served fifteen years of said confinement. Thereafter said child shall be subject to the provisions of law governing the granting of parole permits by the parole board. If said child is adjudicated a delinquent by reason of having violated section one of chapter two hundred and sixty-five and if that adjudication is for murder in the second degree such child chall be committed to a maximum confinement of fifteen years. Such confinement shall be to the custody of the department of youth services in a secure facility until a maximum age of twenty-one years and thereafter to the custody of the department of correction for the remaining portion of that sentence, but in no case shall the confinement be for less than ten years and said child shall not be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven until said child has served ten years of said confinement. Thereafter said child shall be subject to the provisions of law governing the granting of parole permits by the parole board. Notwithstanding any other provisions of this section, if said adjudication is for manslaughter said child shall be committed to the custody of the dapartment of youth services until he reaches twenty-one years of age.

The court shall not suspend the commitment of a child adjudicated to be a delinquent child by reason of having violated section one of chapter two hundred and sixty-five; nor shall the provisions of section one hundred and twenty-nine, one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment.

Amended by St.1947, c. 235; St.1948, c. 310, § 10; St.1949, c. 595; St.1964, c. 308, § 3; St. 1969, c. 838, § 23; St.1978, c. 478, § 65; St.1990, c. 267, § 5; St.1991, c. 488, § 7; St.1992, c. 379, § 22; St.1992, c. 398, §§ 4, 5.

CHAPTER 98, ACTS OF 1998

# THE COMMONWEALTH OF MASSACHUSETTS

*In the Year One Thousand Nine Hunderd and Ninety-eight*

## *AN ACT* RELATIVE TO THE PROSECUTION OF JUVENILE OFFENDERS.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to regulate forthwith the prosecution of juvenile offenders in the commonwealth, therefore, it is hereby declared to be an emergency law; necessary for the immediate preservation of the public convenience.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Subsection (a) of section 72 of chapter 119 of the General Laws, as appearing in the 1996 Official Edition, is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:-

The division of the juvenile court department shall continue to have jurisdiction over children who attain their eighteenth birthday pending final adjudication of their cases, including all remands and retrials following appeals from their cases, or during continuances or probation, or after their cases have been placed on file, or for any other proceeding arising out of their cases. Except as provided in subsection (b), nothing herein shall authorize the commitment of a person to the department of youth services after he has attained his nineteenth birthday.

SECTION 2. Said section 72 of said chapter 119, as so appearing, is hereby further amended by striking out subsection (b) and inserting in place thereof the following subsection:-

(b) If the commonwealth has proceeded by indictment, the divisions of the juvenile court department shall continue to have jurisdiction over such persons who attain their eighteenth birthday pending the final adjudication of their cases, including all remands and retrials following appeals from their cases, or pending the determination allowed under section 58, or during continuances or probation, or after their cases have been placed on file, or for any other proceeding arising out of their cases. Nothing herein shall authorize the commitment of a youthful offender to the department of youth services after he has attained his twenty-first birthday.

SECTION 3. Notwithstanding any language contained in section 72 of chapter 119 of the General Laws relating to the age limitation for persons over whom the juvenile court may exercise power and authority, as said section 72 appeared during all times relevant to the provisions of this section, the divisions of the juvenile court department and the juvenile sessions of the trial courts shall continue to have jurisdiction over persons whose cases were properly commenced in juvenile court, regardless of the current age of the person charged, pending final adjudication of such cases, including all remands and retrials following appeals from such cases, or during continuances or probation, or after such cases have been placed on file, or for any other proceeding arising out of such cases, unless such persons were transferred to another division of the trial court, in which case jurisdiction over such persons shall remain with such other division.

SECTION 4. Sections 1 and 2 of this act shall apply to complaints filed and indictments returned for offenses allegedly committed on or after October 1, 1996.

SECTION 5. Setion 3 of this act shall apply to complaints filed and indictments returned for offenses allegedly committed between December 31, 1991 and September 30, 1996, inclusive; provided, however, that nothing in this act shall be deemed to confer jurisdiction on the juvenile court over persons who are charged with committing murder in the first or second degree, and who at the time of said murder had

attained the age of 14, if said murder was allegedly committed on or after July 27, 1996.

House of Representatives, April 23, 1998.
Preamble adopted, Barbara Gardner, Speaker.

In Senate, April 23, 1998.
Preamble adopted, Thomas Birmingham, President.

House of Representatives, April 23, 1998.
Bill passed to be enacted, Barbara Gardner, Speaker.

In Senate, April 23, 1998.
Bill passed to be enacted, Thomas Birmingham, President.

Aril 23, 1998.

Approved,
at 4 o'clock and 01 minutes, P.M.

Argeo Paul Cellucci
Acting Governor.

## RULE 23 OF THE RULES OF APPELLATE PROCEDURE

**Appellate Rule 23. Issuance of Rescript: Stay of Rescript**

The clerk of the appellate court shall mail to all parties a copy of the rescript and the opinion, if one was written. The rescript of the court shall issue to the lower court twenty-eight days afer the date of the rescript unless the time is shortened or enlarged by order. The timely filing of a petition for rehearing or of an application for further appellate review will stay the rescript until disposition of the petition or application unless otherwise ordered by the appellate court. If the petition or application is denied, the rescript shall issue forthwith unless the appellate court or a single justice orders otherwise. If an application for further review is granted the rescript of the Appeals Court shall not issue to the lower court.

Amended effective Feb. 24, 1975